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Legal aspects of electronic commerce

Explanatory note on the Convention on the Use of Electronic Communications in International Contracts

Note by the Secretariat

Addendum

1. The Commission approved the final draft of the United Nations Convention on the Use of Electronic Communications in International Contracts ("the Convention") at its thirty-eighth session (Vienna, 4-15 July 2005). The Convention was subsequently adopted by the General Assembly and opened for signature on ... .

2. When it approved the final draft for adoption by the General Assembly, at its thirty-eighth session, the Commission requested the Secretariat to prepare explanatory notes on the Convention and present them to the Commission at its thirty-ninth session (see A/60/17, para. 165).

3. Annex I to this note contains article-by-article remarks on the Convention. The Commission may wish to take note of the explanatory notes and request their publication by the Secretariat, together with the final text of the Convention.

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IV. Article-by-article remarks (*continued*)

CHAPTER III. USE OF ELECTRONIC COMMUNICATIONS IN INTERNATIONAL CONTRACTS

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Article 11. Invitations to make offers

A proposal to conclude a contract made through one or more electronic communications which is not addressed to one or more specific parties, but is generally accessible to parties making use of information systems, including proposals that make use of interactive applications for the placement of orders through such information systems, is to be considered as an invitation to make offers, unless it clearly indicates the intention of the party making the proposal to be bound in case of acceptance.

1. Purpose of the article

1. This article is based on article 14, paragraph 1, of the United Nations Sales Convention. Its purpose is to clarify an issue that has raised considerable debate since the advent of the Internet, namely the extent to which parties offering goods or services through open, generally accessible communication systems, such as an Internet website, are bound by advertisements made in this way (A/CN.9/509, para. 75).

2. In a paper-based environment, advertisements in newspapers, radio and television, catalogues, brochures, price lists or other means not addressed to one or more specific persons, but generally accessible to the public, are regarded as invitations to submit offers (according to some legal writers, even in those cases where they are directed to a specific group of customers), since in such cases the intention to be bound is considered to be lacking. By the same token, the mere display of goods in shop windows and on self-service shelves is usually regarded as an invitation to submit offers. This understanding is consistent with article 14, paragraph 2, of the United Nations Sales Convention, which provides that a proposal other than a proposal addressed to one or more specific persons is to be considered as merely an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal (A/CN.9/509, para. 76).

3. In keeping with the principle of media neutrality, UNCITRAL took the view that the solution for online transactions should not be different from the solution used for equivalent situations in a paper-based environment. UNCITRAL therefore agreed that, as a general rule, a company that advertises goods or services on the Internet or through other open networks should be considered as merely inviting those who accessed the site to make offers. Thus, an offer of goods or services through the Internet does not prima facie constitute a binding offer (A/CN.9/509, para. 77).

2. Rationale for the rule

4. If the United Nations Sales Convention's notion of "offer" is transposed to an electronic environment, a company that advertises its goods or services on the

Internet or through other open networks should be considered to be merely inviting those who access the site to make offers. Thus, an offer of goods or services through the Internet would not prima facie constitute a binding offer.

5. The difficulty that may arise in this context is how to strike a balance between a trader's possible intention (or lack thereof) of being bound by an offer, on the one hand, and the protection of relying parties acting in good faith, on the other. The Internet makes it possible to address specific information to a virtually unlimited number of persons and current technology permits contracts to be concluded nearly instantaneously, or at least creates the impression that a contract has been so concluded.

6. In legal literature, it has been suggested that that the "invitation to treat" model might not be appropriate for uncritical transposition to an Internet environment (see A/CN.9/WG.IV/WP.104/Add.1, paras. 4-7). One possible criterion for distinguishing between a binding offer and an invitation to treat may be based on the nature of the applications used by the parties. Legal writings on electronic contracting have proposed a distinction between websites offering goods or services through interactive applications and those that use non-interactive applications. If a website only offers information about a company and its products and any contact with potential customers lies outside the electronic medium, there would be little difference from a conventional advertisement. However, an Internet website that uses interactive applications may enable negotiation and immediate conclusion of a contract (in the case of virtual goods even immediate performance). Legal writings on electronic commerce have proposed that such interactive applications might be regarded as an offer "open for acceptance while stocks last", as opposed to an "invitation to treat". This proposition is at least at first sight consistent with legal thinking for traditional transactions. Indeed, the notion of offers to the public that are binding upon the offeror "while stocks last" is recognized also for international sales transactions.

7. In support of this approach, it has been argued that parties acting upon offers of goods or services made through the use of interactive applications might be led to assume that offers made through such systems were firm offers and that by placing an order they might be validly concluding a binding contract at that point in time. Those parties, it has been said, should be able to rely on such a reasonable assumption in view of the potentially significant economic consequences of contract frustration, in particular in connection with purchase orders for commodities or other items with highly fluctuating prices. Attaching consequence to the use of interactive applications, it was further said, might help enhance transparency in trading practices by encouraging business entities to state clearly whether or not they accepted to be bound by acceptance of offers of goods or services or whether they were only extending invitations to make offers (A/CN.9/509, para. 81).

8. UNCITRAL considered these arguments carefully. The final consensus was that the potentially unlimited reach of the Internet call for caution in establishing the legal value of theses "offers". It was found that attaching a presumption of binding intention to the use of interactive applications would be detrimental for sellers holding a limited stock of certain goods, if the seller were to be liable to fulfil all purchase orders received from a potentially unlimited number of buyers (A/CN.9/546, para. 107). In order to avert that risk, companies offering goods or services through a website that use interactive applications enabling negotiation and

immediate processing of purchase orders for goods or services frequently indicate in their websites that they are not bound by those offers. UNCITRAL felt that, if this was already the case in practice, the Convention should not reverse it (A/CN.9/509, para. 82; A/CN.9/528, para. 116).

3. Notion of interactive applications and intention to be bound in case of acceptance

9. The general principle that offers of goods or services that are accessible to an unlimited number of persons are not binding applies even when the offer is supported by an interactive application. Typically an "interactive application" is a combination of software and hardware for conveying offers of goods and services in a manner that allows for the parties to exchange information in a structured form with a view to concluding a contract automatically. The expression "interactive applications" focuses on what is apparent to the person accessing the system, namely that it is prompted to exchange information through that information system by means of immediate actions and responses having an appearance of automaticity (A/60/17, para. 87). It is irrelevant how the system functions internally and to what extent it is really automated (e.g. whether other actions, by human intervention or through the use of other equipment, might be required in order to effectively conclude a contract or process an order) (A/CN.9/546, para. 114).

10. UNCITRAL recognizes that in some situations it may be appropriate to regard a proposal to conclude a contract that is supported by interactive applications as evidencing the party's intent to be bound in case of acceptance. Some business models are indeed based on the rule that offers through interactive applications are binding offers. In those cases, possible concerns about the limited availability of the relevant product or service are often addressed by including disclaimers stating that the offers were for a limited quantity only and by the automatic placement of orders according to the time they were received (A/CN.9/546, para. 112). UNCITRAL also noted that some case law seems to support the view that offers made by so-called "click-wrap" agreements and in Internet auctions may be interpreted as binding (A/CN.9/546, para. 109, see also A/CN.9/WG.IV/WP.104/Add.1, paras. 11-17). However, the extent to which this intent indeed exists is a matter to be assessed in the light of all the circumstances (for example, disclaimers made by the vendor or the general terms and conditions of the auction platform). As a general rule, UNCITRAL considered that it would be unwise to presume that persons using interactive applications to make offers always intended to make binding offers, because this presumption would not reflect the prevailing practice in the marketplace (A/CN.9/546, para. 112).

11. It should be noted that a proposal to conclude a contract only constitutes an offer if a number of conditions are fulfilled. For a sales contract governed by the United Nations Sales Convention, for example, the proposal must be sufficiently definite by indicating the goods and expressly or implicitly fixing or making provision for determining the quantity and the price.[1] Article 11 is not intended to create special rules for contract formation in electronic commerce. Accordingly, a party's intention to be bound would not suffice to constitute an offer in the absence of those other elements (A/CN.9/546, para. 111).

[1] United Nations Sales Convention, article 14, paragraph 1.

References to preparatory work:

UNCITRAL, 38th session (Vienna, 4-15 July 2005)	A/60/17, paras. 85-88
WG.IV, 44th session (Vienna, 11-22 October 2004)	A/CN.9/571, paras. 167-172
WG.IV, 42nd session (Vienna, 17-21 November 2003)	A/CN.9/546, paras. 106-116
WG.IV, 41st session (New York, 5-9 May 2003)	A/CN.9/528, paras. 109-120
WG.IV, 39th session (New York, 11-15 March 2002)	A/CN.9/509, paras. 74-85

Article 12. Use of automated message systems for contract formation

A contract formed by the interaction of an automated message system and a natural person, or by the interaction of automated message systems, shall not be denied validity or enforceability on the sole ground that no natural person reviewed or intervened in each of the individual actions carried out by the automated message systems or the resulting contract.

1. Purpose of the article

12. Automated message systems, sometimes called "electronic agents", are being used increasingly in electronic commerce and have caused scholars in some legal systems to revisit traditional legal theories of contract formation to assess their adequacy to contracts that come into being without human intervention.

13. Existing uniform law conventions do not seem in any way to preclude the use of automated message systems, for example, for issuing purchase orders or processing purchase applications. This seems to be the case in connection with the United Nations Sales Convention, which allows the parties to create their own rules, for example, in an electronic data interchange (EDI) trading partner agreement regulating the use of "electronic agents". The UNCITRAL Model Law on Electronic Commerce also lacks a specific rule on the matter. While nothing in the Model Law seems to create obstacles to the use of fully automated message systems, it does not deal specifically with those systems, except for the general rule on attribution in article 13, paragraph 2 (b).

14. Even if no modification appeared to be needed in general rules of contract law, UNCITRAL considered that it would be useful for the Convention to make provisions to facilitate the use of automatic message systems in electronic commerce. A number of jurisdictions have found it necessary or at least useful to enact similar provisions in domestic legislation on electronic commerce (A/CN.9/546, paras. 124-126). Article 12 of the Convention embodies a non-discrimination rule intended to make it clear that the absence of human review of or intervention in a particular transaction does not by itself preclude contract formation. Therefore, while a number of reasons may otherwise render a contract invalid under domestic law, the sole fact that automated message systems were used for purposes of contract formation will not deprive the contract of legal effectiveness, validity or enforceability.

2. Attribution of actions performed by automated message systems

15. At present, the attribution of actions of automated message systems to a person or legal entity is based on the paradigm that an automated message system is

capable of performing only within the technical structures of its preset programming. However, at least in theory it is conceivable that future generations of automated information systems may be created with the ability to act autonomously, and not just automatically. That is, through developments in artificial intelligence, a computer may be able to learn through experience, modify the instructions in its own programs, and even devise new instructions.

16. Already during the preparation of the Model Law on Electronic Commerce, UNCITRAL had taken the view that that, while the expression "electronic agent" had been used for purposes of convenience, the analogy between an automated message system and a sales agent was not appropriate. General principles of agency law (for example, principles involving limitation of liability as a result of the faulty behaviour of the agent) could not be used in connection with the operation of such systems. UNCITRAL also considered that, as a general principle, the person (whether a natural person or a legal entity) on whose behalf a computer was programmed should ultimately be responsible for any message generated by the machine (A/CN.9/484, paras. 106 and 107).

17. Article 12 is an enabling provision, and should not be misinterpreted as allowing for an automated message system or a computer to be made the subject of rights and obligations. Electronic communications that are generated automatically by message systems or computers without direct human intervention should be regarded as "originating" from the legal entity on behalf of which the message system or computer is operated. Questions relevant to agency that might arise in that context are to be settled under rules outside the Convention.

3. Means of indicating assent and extent of human intervention

18. When a contract is formed by the interaction of an automated message system and a natural person, or by the interaction of automated message systems, there are several ways to indicate the contracting parties' assent. Computers may exchange messages automatically according to an agreed standard, or a person may indicate assent by touching or clicking on a designated icon or place on a computer screen. Article 12 does not attempt to illustrate the ways in which assent may be expressed out of a concern to respect technological neutrality and because any illustrative list would carry the risk of being incomplete or becoming dated, as other means of indicating assent not expressly mentioned might already be in use or might possibly become widely used in the future (A/CN.9/509, para. 89).

19. The central rule in the article is that the validity of a contract does not require human review of each of the individual actions carried out by the automated message system or the resulting contract. For the purposes of the article, it is irrelevant whether all message systems involved are fully automated or merely semi-automated (for example, where some actions are only effected following some form of human intervention), as long as at least one of them does not need human "review or intervention", to complete its task (A/CN.9/527, para. 114).

References to preparatory work:

UNCITRAL, 38th session (Vienna, 4-15 July 2005)	A/60/17, paras. 89-92
WG.IV, 44th session (Vienna, 11-22 October 2004)	A/CN.9/571, paras. 173-174
WG.IV, 39th session (New York, 11-15 March 2002)	A/CN.9/509, paras. 99-103

Article 13. Availability of contract terms

Nothing in this Convention affects the application of any rule of law that may require a party that negotiates some or all of the terms of a contract through the exchange of electronic communications to make available to the other party those electronic communications that contain the contractual terms in a particular manner, or relieves a party from the legal consequences of its failure to do so.

1. Contract terms in electronic commerce

20. Except for purely oral transactions, most contracts negotiated through traditional means result in some tangible record of the transaction to which the parties can refer in case of doubt or dispute. In electronic contracting, such a record, which may exist as a data message, may only be temporarily retained or may be available only to the party through whose information system the contract was concluded. Thus, some recent legislation on electronic commerce requires that a person offering goods or services through information systems accessible to the public should provide means for storage or printing of the contract terms.

21. The rationale for creating such specific obligations seems to be an interest in enhancing legal certainty, transparency and predictability in international transactions concluded by electronic means. Thus, some domestic regimes require certain information to be provided or technical means to be offered in order to make available contract terms in a way that allows for their storage and reproduction, in the absence of a prior agreement between the parties, such as a trading partner agreement or other type of agreement.

22. Domestic laws contemplate a wide variety of consequences for failure to comply with requirements concerning the availability of contract terms negotiated electronically. Some legal systems provide that failure to make the contract terms available constitutes an administrative offence and subject the infringer to payment of a fine. In other jurisdictions, the law gives the customer the right to seek an order from any court having jurisdiction in relation to the contract requiring that service provider to comply with that requirement. Under yet other systems, the consequence is an extension of the period within which a consumer may avoid the contract, which does not begin to run until the time when the merchant has complied with its obligations. In most cases, these sanctions do not exclude other consequences that may be provided in law, such as sanctions under fair competition laws.

2. Non-interference with domestic requirements

23. UNCITRAL considered carefully the desirability of including provisions that require a party to make available the terms of contracts negotiated electronically. It was noted that no similar obligations exist under the United Nations Sales Convention or most international instruments dealing with commercial contracts. UNCITRAL was therefore faced with the question of whether, as a matter of principle, it should propose specific obligations for parties conducting business electronically that do not exist when they contract through more traditional means.

24. UNCITRAL recognized that, when parties negotiate through open networks, such as the Internet, there may be a concrete risk that they would be requested to agree to certain terms and conditions displayed by a vendor, but might not have

access to those terms and conditions at a later stage. This situation, which does not only concern consumers, as it may happen in negotiations between business entities or professional traders, may be unfavourable to the party accepting the contractual terms of the other party. It was argued that this problem does not have the same magnitude in the non-electronic environment, since, except for purely oral contracts, the parties would in most cases have access to a tangible record of the terms governing their contract (A/CN.9/546, para. 134). It was also argued that a duty to make available the terms of contracts negotiated electronically, and possibly also subsequent changes in standard contractual conditions would encourage good business practice and would be equally beneficial for business-to-business and for business-to-consumer commerce (A/CN.9/571, para. 178).

25. The final decision, however, was not in favour of introducing a duty to make available contract terms, as it was felt that this approach would result in imposing rules that do not exist in the context of paper-based transactions, thus departing from the policy that the Convention should not create a duality of regimes governing paper-based contracts on the one hand and electronic transactions on the other (A/CN.9/509, para. 123). It was also considered that it would not be feasible to formulate an appropriate set of possible consequences for failure to comply with a requirement to make available contract terms and that it would be pointless to establish this type of duty in the Convention if no sanction was created (A/CN.9/571, para. 179). For example, UNCITRAL discarded the possibility of rendering commercial contracts invalid for failure to comply with a duty to make contract terms available, because of the unprecedented nature of that solution, as other texts, such as the United Nations Sales Convention, have not dealt with the validity of contracts. On the other hand, providing for other types of sanction, such as tort liability or administrative sanctions was felt to be outside the scope of a uniform instrument on commercial law (A/CN.9/571, para. 177).

26. Article 13 was retained as a reminder for parties that the facilitative rules on the Convention do not relieve them from any obligation they may have to comply with domestic legal requirements that may impose a duty to make contract terms available, for instance pursuant to regulatory regimes governing the provision of online services, especially under consumer protection regulations (A/CN.9/509, para. 63).

3. Nature of legal requirements on availability of contract terms

27. The phrase "any rule of law" in this article has the same meaning as the words "the law" in article 9. They encompass statutory, regulatory and judicially created laws as well as procedural laws but do not cover laws that have not become part of the law of the State, such as lex mercatoria, even though the expression "rules of law" is sometimes used in that broader meaning (A/60/17, para. 94). [why past tense?]

References to preparatory work:

UNCITRAL, 38th session (Vienna, 4-15 July 2005)	A/60/17, paras. 93-94
WG.IV, 44th session (Vienna, 11-22 October 2004)	A/CN.9/571, paras. 175-181
WG.IV, 42nd session (Vienna, 17-21 November 2003)	A/CN.9/546, paras. 130-135
WG.IV, 39th session (New York, 11-15 March 2002)	A/CN.9/509, paras. 122-125

Article 14. Error in electronic communications

1. Where a natural person makes an input error in an electronic communication exchanged with the automated message system of another party and the automated message system does not provide the person with an opportunity to correct the error, that person, or the party on whose behalf that person was acting, has the right to withdraw the portion of the electronic communication in which the input error was made if:

(a) The person, or the party on whose behalf that person was acting, notifies the other party of the error as soon as possible after having learned of the error and indicates that he or she made an error in the electronic communication; and

(b) The person, or the party on whose behalf that person was acting, has not used or received any material benefit or value from the goods or services, if any, received from the other party.

2. Nothing in this article affects the application of any rule of law that may govern the consequences of any error other than as provided for in paragraph 1.

1. Electronic commerce and errors

28. The question of mistakes and errors is closely related to the use of automated message systems in electronic commerce. Such errors may be either the result of human actions (for example, typing errors) or the consequence of malfunctioning of the message system used.

29. Recent legislation on electronic commerce, including some domestic enactments of the UNCITRAL Model Law, contain provisions dealing with errors made by natural persons when dealing with an automated computer system of another person, typically by setting out the conditions under which a natural person is not bound by a contract in the event that the person made an error in an electronic communication. The rationale for these provisions seems to be the relatively higher risk that an error made in transactions involving a natural person, on the one hand, and an automated computer system, on the other, might not be noticed, as compared with transactions that involve only natural persons. Errors made by the natural person in such a situation may become irreversible once acceptance is dispatched. Indeed, in a transaction between individuals there is a greater ability to correct the error before parties have acted on it. However, when an individual makes an error while dealing with the automated message system of the other party, it may not be possible to correct the error before the other party has shipped or taken other action in reliance on the erroneous communication.

30. UNCITRAL considered carefully the desirability of dealing with errors in the Convention. It was noted that the UNCITRAL Model Law on Electronic Commerce, which is not concerned with substantive issues that arise in contract formation, does not deal with the consequences of mistake and error in electronic contracting. Furthermore, article 4, subparagraph (a), of the United Nations Sales Convention expressly provides that matters related to the validity of a sales contract are excluded from its scope, although other international texts, such as the UNIDROIT

Principles of International Commercial Contracts, deal with the consequences of errors for the validity of the contract, albeit restrictively.[2]

31. UNCITRAL was mindful of the need to avoid undue interference with well-established notions of contract law and the creation of specific rules for electronic transactions that might vary from rules that apply to other modes of negotiation. Nevertheless, it felt that there was a need for a specific provision dealing with narrowly defined types of errors in the light of the relatively higher risk of human errors being made in online transactions made through automated message systems than in more traditional modes of contract negotiation (A/CN.9/509, para. 105). The contract law of some legal systems further confirms the need for the article, for example, in view of rules that require a party seeking to avoid the consequences of an error to show that the other party knew or ought to have known that a mistake had been made. While there are means of providing such proof if there is an individual at each end of the transaction, awareness of the mistake is almost impossible to demonstrate when there was an automated process at the other end (A/CN.9/548, para. 18).

2. Scope and purpose of the article

32. Article 14 applies to a very specific situation. It is only concerned with errors that occur in transmissions between a natural person and an automated message system when the system does not provide the person with the possibility to correct the error. The conditions for withdrawal or avoidance of electronic communications affected by errors that occur in any other context are left for domestic law (A/60/17, para. 96).

33. The article deals only with errors made by a natural person, as opposite to a computer or other machine. However, the right to withdraw the portion of the electronic communication is not a right of the natural person but of the party on whose behalf the person was acting (A/CN.9/548, para. 22).

34. Generally, errors made by any automated system should ultimately be attributable to the persons on whose behalf they operated. However, already during the preparation of the UNCITRAL Model Law on Electronic Commerce, it was argued that some circumstances might call for a mitigation of this principle, such as when an automated system generated erroneous messages in a manner that could not have reasonably been anticipated by the person on whose behalf the messages were sent. In practice, the extent to which the party on whose behalf an automated message system is operated is responsible for all its actions may depend on various factors such as the extent to which the party has control over the software or other technical aspects used in programming the system (A/CN.9/484, para. 108). Given the complexity of these questions, in respect of which domestic law may give varying answers depending on the factual situation, it was felt that it would not be appropriate to attempt to formulate uniform rules at the present stage and that jurisprudence should be allowed to evolve.

[2] UNIDROIT Principles of International Commercial Contracts, arts. 3.5 and 3.6.

3. "Opportunity to correct errors"

35. Article 14 authorizes a party who makes an error to withdraw the portion of the electronic communication where the error was made if the automated message system did not provide the person with an opportunity to correct errors. The article does oblige the party on whose behalf the automated message system operates to make available procedures for detecting and correcting errors in electronic contract negotiation.

36. UNCITRAL considered the desirability of introducing such a general obligation, as an alternative for dealing with the right of the parties after an error has occurred. Such an obligation exists in some domestic systems, but the consequences for a party's failure to provide procedures for detecting and correcting errors in electronic contract negotiation vary greatly from country to country. In some jurisdictions, such failure constitutes an administrative offence and subjects the infringer to payment of a fine. In other countries the consequence is either to entitle a customer to rescind the contract or to extend the period within which a consumer may unilaterally cancel an order. The type of consequence provided in each case depends on the type of regulatory approach taken to electronic commerce. During the preparation of the Convention it was felt that, however desirable such an obligation might be in the interest of promoting good business practices, the Convention would not be an appropriate place for it, since the Convention could not provide a complete system of sanctions appropriate for all circumstances (A/CN.9/509, para. 108). The agreement eventually reached on this point was that, instead of requiring generally that an opportunity to correct errors should be provided, the Convention should limit itself to providing a remedy for the person making the error (A/CN.9/548, para. 19).

37. Article 14 deals with the allocation of risks concerning errors in electronic communications in a fair and sensible manner. An electronic communication can only be withdrawn if the automated message system did not provide the originator with an opportunity to correct the error before sending the electronic communication. If no such system is in place, the party on whose behalf the automated message system operates bears the risk of errors that may occur. Thus, the article gives an incentive to parties acting through automated message systems to build in safeguards that enable their contract partners to prevent the sending of an erroneous communication, or correct the error once sent. For example, the automated message system may be programmed to provide a "confirmation screen" to the person setting forth all the information the individual initially approved. This would provide the person with the ability to prevent the erroneous communication from ever being sent. Similarly, the automated message system might receive the communication sent by the person and then send back a confirmation which the person must again accept before the transaction is completed. This would allow for correction of an erroneous communication. In either case, the automated message system would "provide an opportunity to correct the error," and the article would not apply. Rather, other law would govern the effect of any error.

4. Notion and proof of "input error"

38. Article 14 is only concerned with "input" errors, that is, errors relating to inputting wrong data in communications exchanged with an automated message system. These are typically unintentional keystroke errors, which are felt to be

potentially more frequent in transactions made through automated information systems than in more traditional modes of contract negotiation. For example, while it would be unlikely for a person to deliver documents unintentionally to a post office, in practice there were precedents where persons had claimed not to have intended to confirm a contract by hitting "Enter" on a computer keyboard or clicking on an "I agree" icon on a computer screen.

39. The article is not intended to be media-neutral, since it deals with a specific issue affecting certain forms of electronic communications. In doing so, article 14 does not overrule existing law on error, but merely offers a meaningful addition to it by focusing on the importance of providing means of having the error corrected (A/CN.9/548, para. 17). Other types of error are left for the general doctrine of error under domestic law (A/CN.9/571, para. 190).

40. As is already the case in a paper-based environment, the factual determination as to whether or not an input error has indeed occurred is a matter that needs to be assessed by the courts in the light of the entire evidence and relevant circumstances, including the overall credibility of a party's assertions (A/CN.9/571, para. 186). The right to withdraw an electronic communication is an exceptional remedy to protect a party in error and not a blank opportunity for parties to repudiate disadvantageous transactions or nullify what would otherwise be valid legal commitments freely accepted. This right is justified by the consideration that a reasonable person in the position of the originator would not have issued the electronic communication, had that person been aware of the error at that time. However, article 14 does not require a determination of the intent of the party who sent the allegedly erroneous message. If the operator of the automated message system fails to offer means for correcting errors despite the clear incentive to do so in article 14, it is reasonable to make such party bear the risk of errors being made in electronic communications exchanged through the automated message system. Limiting the right of the party in error to withdraw the messages would not further the intended goal of the provision to encourage parties to provide for an error-correction method in automated message systems (A/60/17, para. 97).

5. "Withdraw"

41. Article 14 does not invalidate an electronic communication in which an input error is made. It only gives the person in error the right to "withdraw" the portion of the electronic communication in which the error was made. The term "withdraw" was deliberately used instead of other alternatives, such as "avoiding the consequences" of the electronic communication or similar expressions that might be interpreted as referring to the validity of an act and lead to discussions as to whether the act was null and void or avoidable at the party's request.

42. Furthermore, article 14 does not provide for a right to "correct" the error made. During the preparation of the Convention it was argued that the remedy should be limited to the correction of an input error, so as to reduce the risk that a party would allege an error as an excuse to withdraw from an unfavourable contract. Another proposal was that the person who makes an input error should have a choice to "correct or withdraw" the electronic communication in which the error was made. This possibility, it was argued, would cover both situations where correction was the appropriate remedy for the error (such as typing the wrong quantity in an order) and situations where withdrawal would be a better remedy

(such as when a person unintentionally hit a wrong key or an "I agree" button and sent a message he or she did not intend to send) (A/CN.9/571, para. 193).

43. After extensive consideration of those options, UNCITRAL agreed that the person who makes an error should only have the right to withdraw the portion of the electronic communication in which the error was made. In most legal systems, the typical consequence of an error is to make it possible for the party in error to avoid the effect of the transaction resulting from its error, but not necessarily to restore the original intent and enter into a new transaction. While withdrawal may in most cases equate to nullification of a communication, correction would require the possibility to modify the previous communication. UNCITRAL was not willing to create a general right to "correct" erroneous communications, as this would have introduced additional costs for system providers and given remedies with no parallel in the paper world, a result which the Working Group had previously agreed to avoid. A right to correct electronic communications would also cause practical difficulties, as operators of automated message systems may more readily provide an opportunity to nullify a communication already recorded than an opportunity to correct errors after a transaction was concluded. Furthermore, a right to correct errors might entail that an offeror who received an electronic communication later alleged to contain errors must keep its original offer open since the other party had effectively replaced the communication withdrawn (A/60/17, para. 98).

6. The "portion of the electronic communication in which the input error was made"

44. The right to withdraw relates only the part of the electronic communication where the error was made, if the information system so allows. This has the dual scope of granting to parties the possibility to redress errors in electronic communications, when no means of correcting errors are made available, and of preserving as much as possible the effects of the contract, by correcting only the portion vitiated by the error, in line with the general principle of preservation of contracts (A/CN.9/571, para. 195).

45. Article 14 does not expressly establish the consequences of the withdrawal of the portion of an electronic communication in which an error was made. It is understood that, depending on the circumstances, the withdrawal of a portion of an electronic communication may invalidate the entire communication or render it ineffective for purposes of contract formation (A/60/17, para. 100). For example, if the portion withdrawn contains the reference to the nature of the goods being ordered, the electronic communication would not be "sufficiently definite" for purposes of contract formation under article 14, paragraph 1, of the United Nations Sales Convention. The same conclusion should apply if the portion withdrawn concerns price or quantity of goods and there are no other elements left in the electronic communication according to which they could be determined. However, withdrawal of a portion of the electronic communication that concerned matters that are not, by themselves or pursuant to the intent of the parties, essential elements of the contract, may not necessarily devoid the electronic communication of its effectiveness.

7. Conditions for withdrawing an electronic communication

46. Subparagraphs 1 (a) and 1 (b) establish two conditions for a party to exercise the right to withdraw: to notify the other party as soon as possible and not to have used or received any material benefit or value from the goods or services, if any, received from the other party.

47. UNCITRAL considered extensively whether the right to withdraw the electronic communication should be limited in any way, in particular as the conditions contemplated in article 14 may differ from the consequences of avoidance of contracts under some legal systems (see A/CN.9/548, para. 23). It was, however, felt that the conditions set forth in subparagraphs 1 (a) and 1 (b) provide a useful remedy for cases in which the automated message system proceeds to deliver physical or virtual goods or services immediately upon conclusion of the contract, with no possibility to stop the process. UNCITRAL considered that in those cases subparagraphs 1 (a) and 1 (b) provide a fair basis for the exercise of the right of withdrawal and would also tend to limit abuses by parties acting in bad faith (A/CN.9/571, para. 203).

(a) Notice of error and time limit for withdrawing an electronic communication

48. Subparagraph 1 (a) requires the natural person or the party on whose behalf the person was acting to take prompt action to advise the other party of the error and the fact that the individual did not intend the electronic record. Whether the action is prompt must be determined from all the circumstances including the person's ability to contact the other party. The natural person or the party on whose behalf the person was acting should advise the other party both of the error and of the lack of intention to be bound (i.e. avoidance) by the portion of the electronic communication in which the error occurred. However, the party receiving the message should be able to rely on the message, despite the error, up to the point of receiving a notice of error (A/CN.9/548, para. 24).

49. In some domestic systems that require the operator of automated message systems used for contract formation to provide an opportunity to correct errors, the right to withdraw or avoid a communication must be exercised at the moment of reviewing the communication before dispatch. Under those systems, the party who makes an error cannot withdraw the communication after it has been confirmed. Article 14 does not limit the right to withdrawal in this way, since in practice, a party may only become aware that it has made an error at a later stage, for instance, when it receives goods of a type or in a quantity different from what it had originally intended to order (A/CN.9/571, para. 191).

50. Furthermore, article 14 does not deal with the time limit for exercising the right of withdrawal in case of input error, as time limits are a matter of public policy in many legal systems. Nevertheless, the parties are not exposed to indefinite withdrawal. The combined impact of subparagraphs 1 (a) and 1 (b) limits the time within which an electronic communication could be withdrawn, since withdrawal has to occur "as soon as possible", but in any event not later than the time when the party had used or received any material benefit or value from the goods or services received from the other party (A/60/17, para. 103).

(b) Loss of right to withdraw an electronic communication

51. It should be noted that goods or services may have been provided on the basis of an allegedly erroneous communication before receipt of the notice required by subparagraph 1 (a). Subparagraph 1 (b) avoids unjustified windfalls to the natural person or the party on whose behalf that person was acting by erecting stringent requirements before the party in error may exercise the right of withdrawal under the paragraph. Under this provision a party looses the right to withdrawal when the person received material benefits or value from the vitiated communication (A/60/17, para. 102).

52. UNCITRAL recognized that such a limitation in the right to invoke an error in order to avoid the consequences of a legally relevant act may not exist in all legal systems under general contract law. The risk of illegitimate windfalls for a person who successfully avoids a contract is usually dealt with by legal theories such as restitution or unjust enrichment. Nevertheless, it was felt that the particular context of electronic commerce justifies establishing a particular rule to avoid that risk.

53. Various transactions in electronic commerce may be concluded nearly instantaneously and generate immediate value or benefit for the party purchasing the relevant goods or services. In many cases, it may be impossible to restore the conditions as they existed prior to the transaction. For example, if the consideration received is information, it may not be possible to avoid the benefit conferred. While the information itself could be returned, mere access to the information, or the ability to redistribute the information would constitute a benefit that could not be returned. It may also occur that the mistaken party receives consideration that changes in value between the time of receipt and the first opportunity to return. In such a case restitution cannot be made adequately. In all these cases it would not be equitable to allow that, by withdrawing the portion of the electronic communication in which an error was made, a party could avoid the entire transaction while effectively retaining the benefit gained from it. This limitation is further important in view of the large number of electronic transactions involving intermediaries that may be harmed because transactions cannot be unwound.

8. Relationship to general law on mistake

54. The underlying purpose of article 14 is to provide a specific remedy in respect of input errors that occur under particular circumstances and not to interfere with the general doctrine on error under domestic laws (A/60/17, para. 104). If the conditions set forth in paragraph 1 are not met (that is, if the error is not an "input" error made by a natural person, or if the automated message system did in fact provide the person with an opportunity to correct the error), the consequences of the error would be as provided for by other laws, including the law on error, and by any agreement between the parties (A/CN.9/548, para. 20).

References to preparatory work:

UNCITRAL, 38th session (Vienna, 4-15 July 2005)	A/60/17, paras. 95-103
WG.IV, 44th session (Vienna, 11-22 October 2004)	A/CN.9/571, paras. 182-206
WG.IV, 43rd session (New York, 15-19 March 2004)	A/CN.9/548, paras. 14-26
WG.IV, 39th session (New York, 11-15 March 2002)	A/CN.9/509, para. 99 and paras. 104-111

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Legal aspects of electronic commerce

Explanatory note on the Convention on the Use of Electronic Communications in International Contracts

Note by the Secretariat

Addendum

1. The Commission approved the final draft of the United Nations Convention on the Use of Electronic Communications in International Contracts ("the Convention") at its thirty-eighth session (Vienna, 4-15 July 2005). The Convention was subsequently adopted by the General Assembly on 23 November 2005 and opened it for signature from 16 January 2006 to 16 January 2008.

2. When it approved the final draft for adoption by the General Assembly, at its thirty-eighth session, the Commission requested the Secretariat to prepare explanatory notes on the Convention and present them to the Commission at its thirty-ninth session (see A/60/17, para. 165).

3. Annex I to this note contains article-by-article remarks on the Convention. The Commission may wish to take note of the explanatory notes and request their publication by the Secretariat, together with the final text of the Convention.

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IV. Article-by-article remarks (*continued*)

CHAPTER IV. FINAL PROVISIONS

Article 15. Depositary

The Secretary-General of the United Nations is hereby designated as the depositary for this Convention.

1. Articles 15 to 25 form part of the final provisions of the Convention. Most of them are customary provisions in multilateral treaties and are not intended to create rights and obligations for private parties. However, as these provisions regulate the extent to which a Contracting State is bound by the Convention, including the time the Convention or any declaration submitted thereunder enter into force, they may affect the ability of the parties to rely on the provisions of the Convention.

2. Article 15 designates the Secretary-General of the United Nations as depositary of the Convention. The depositary is entrusted with the custody of the authentic texts of the Convention and of any full powers delivered to the depositary, and performs a number of administrative services in connection therewith, such as preparing certified copies of the original text; receiving signatures to the Convention and receiving and keeping custody of any instruments, notifications and communications relating to it; informing the Contracting States and the States entitled to become Contracting States of acts, notifications and communications relating to the Convention.

References to preparatory work:

UNCITRAL, 38th session (Vienna, 4-15 July 2005)	A/60/17, paras. 106-107
WG.IV, 44th session (Vienna, 11-22 October 2004)	A/CN.9/571, para. 10

Article 16. Signature, ratification, acceptance or approval

1. This Convention is open for signature by all States at the United Nations Headquarters in New York from 16 January 2006 to 16 January 2008.

2. This Convention is subject to ratification, acceptance or approval by the signatory States.

3. This Convention is open for accession by all States which are not signatory States as from the date it is open for signature.

4. Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary General of the United Nations.

1. The "all States" formula

3. According to a formula frequently used in multilateral treaties in order to promote widest possible participation, article 16 declares the Convention open for signature by "all States".

4. It should be noted, however, that the Secretary-General, as depositary, stated on a number of occasions that it would fall outside his competence to determine

whether a territory or other such entity would fall within the "all States" formula. Pursuant to a general understanding adopted by the General Assembly on 14 December 1973, in discharging his functions as a depositary of a convention with the "all States" clause, the Secretary-General will follow the practice of the General Assembly and, whenever advisable, will request the opinion of the Assembly before receiving a signature or an instrument of ratification or accession.[1]

2. Consent to be bound by ratification, acceptance, approval or accession

5. While some treaties provide that States may express their consent to be legally bound by signature alone, the Convention, like most modern multilateral treaties, provides that it is subject to ratification, acceptance or approval by the signatory States. Providing for signature subject to ratification, acceptance or approval allows States time to seek approval for the Convention at the domestic level and to enact any legislation necessary to implement the Convention internally, prior to undertaking the legal obligations from the Convention at the international level. Upon ratification, the Convention legally binds the States.

6. Acceptance or approval of a treaty following signature has the same legal effect as ratification, and the same rules apply. Accession has the same legal effect as ratification, acceptance or approval. However, unlike ratification, acceptance or approval, which must be preceded by signature, accession requires only the deposit of an instrument of accession. Accession as a means of becoming party to a treaty is generally used by States wishing to express their consent to be bound by a treaty if, for whatever reason, they are unable to sign it. This may occur if the deadline for signature has passed or if domestic circumstances prevent a State from signing a treaty.

References to preparatory work:

UNCITRAL, 38th session (Vienna, 4-15 July 2005)	A/60/17, paras. 108-110
WG.IV, 44th session (Vienna, 11-22 October 2004)	A/CN.9/571, para. 10

Article 17. Participation by regional economic integration organizations

1. A regional economic integration organization which is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The regional economic integration organization shall in that case have the rights and obligations of a Contracting State, to the extent that that organization has competence over matters governed by this Convention. Where the number of Contracting States is relevant in this Convention, the regional economic integration organization shall not count as a Contracting State in addition to its member States which are Contracting States.

[1] See *United Nations Juridical Yearbook. 1973* (United Nations publication Sales No.E.75.V.1), p. 79, note 9 and ibid., 1974 (United Nations publication Sales No.E.76.V.1), p. 157.

2. The regional economic integration organization shall, at the time of signature, ratification, acceptance, approval or accession, make a declaration to the depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that organization by its member States. The regional economic integration organization shall promptly notify the depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.

3. Any reference to a "Contracting State" or "Contracting States" in this Convention applies equally to a regional economic integration organization where the context so requires.

4. This Convention shall not prevail over any conflicting rules of any regional economic integration organization as applicable to parties whose respective places of business are located in member States of any such organization, as set out by declaration made in accordance with article 21.

1. Notion of "regional economic integration organization"

7. In addition to "States", the Convention allows participation by international organizations of a particular type, namely "regional economic integration organizations". In introducing this article, which had not yet appeared in its previous texts, UNCITRAL acknowledged the growing importance of regional economic integration organizations, which are already allowed to participate in several trade-related treaties, including recent international conventions in the field of international commercial law, such as the UNIDROIT Convention on International Interests in Mobile Equipment (Cape Town, 2001)[2] (the "Cape Town Convention").

8. The Convention does not contain a definition of "regional economic integration organizations". Nevertheless, it could be said that the notion of "regional economic integration organizations" used in article 17 encompasses two key elements: the grouping of States in a certain region for the realization of common purposes and the transfer of competencies relating to those common purposes from the members of the regional economic integration organization to the organization.

9. Although the notion of "regional economic integration organization" is a flexible one, participation in the Convention is not open to international organizations at large. It was noted that, at the present stage, most international organizations do not have the power to enact legally binding rules having a direct effect on private contracts, since that function typically requires the exercise of certain attributes of State sovereignty that only few organizations, typically regional economic integration organizations, have received from their member States (A/60/17, para. 113).

[2] Available at http://www.unidroit.org/english/conventions/mobile-equipment/main.htm.

2. Extent of competence of the regional economic integration organization

10. The Convention is not concerned with the internal procedures leading to signature, acceptance, approval or accession by a regional economic integration organization. The Convention itself does not require a separate act of authorization by the member States of the organization and does not answer, in one way or the other, the question as to whether a regional economic integration organization has the right to ratify the convention if none of its member States decides to do so. For the Convention, the extent of treaty powers given to a regional economic integration organization is an internal matter concerning the relations between the organization and its own member States. Article 17 does not prescribe the manner in which regional economic integration organizations and their member States divide competences and powers among themselves (A/60/17, para. 114).

11. Notwithstanding its neutral approach in respect of the internal affairs of a regional economic integration organization, the Convention only allows ratification by an organization that "has competence over certain matters governed by this Convention", as clearly stated in paragraph 1. This competence needs further to be demonstrated by a declaration made to the depositary pursuant to paragraph 2 specifying the matters governed by the Convention in respect of which competence has been transferred to that organization by its member States. Article 17 does not provide a basis for ratification if the regional economic integration organization has no competence on the subject matter covered by the Convention (A/60/17, para. 116).

12. However, the regional economic integration organization does not need to have competence over all the matters covered by the Convention, which admits that such competence may be partial or concurrent. Regional economic integration organizations typically derive their powers from their member States. By their very nature, as international organizations, regional economic integration organizations have competences in the areas that have been expressly or implicitly transferred to their sphere of activities. Several provisions of the Convention, in particular those in chapter IV, imply the exercise of full State sovereignty and the Convention is not in its entirety capable of being applied by a regional economic integration organization. Furthermore, the legislative authority over the substantive matters dealt with by the Convention may be shared to some extent between the organization and its member States (A/60/17, para. 116).

3. Coordination between regional economic integration organizations and their member States

13. By acceding to the Convention, a regional economic integration organization becomes a Contracting Party in its own right and has, therefore, the right to submit declarations excluding or including matters in the scope of application of the Convention pursuant to articles 19 and 20. The Convention itself does not set forth mechanisms to ensure the consistency between declarations made by a regional economic integration organization and those made by its member States.

14. Possible inconsistencies between declarations submitted by a regional economic integration organization and declarations submitted by its member States would create considerable uncertainty in the application of the convention and deprive private parties of the ability to easily ascertain beforehand to which matters

the convention applied in respect of which States. They would therefore be highly undesirable (A/60/17, para. 115).

15. In practice, however, it is expected that conflicting declarations by a regional economic integration organization and its member States would be unlikely. Indeed, paragraph 2 of article 17 already imposes a high standard of coordination by requiring the regional economic integration organization to declare the specific matters for which it has competence. Under normal circumstances, careful consultations would take place, as a result of which, if declarations under article 19 or 20 are found to be necessary, there would be a set of common declarations for the matters in respect of which the regional economic integration organization was competent, which would be mandatory for all member States of the organization. Differing declarations from member States would thus be limited to matters in which no exclusive competence had been transferred from member States to the regional economic integration organization, or matters particular to the State making a declaration, as might be the case, for example, of declarations under article 20, paragraphs 2 to 4, since member States of regional economic integration organizations may not necessarily be Contracting States to the same international conventions or treaties (A/60/17, para. 117).

16. In any event, there is an obvious need for ensuring consistency between declarations made by regional economic integration organizations and declarations made by their member States. Private parties in third countries should be able to ascertain without inordinate effort when the member States and when the organization have the power to make a particular declaration (A/60/17, para. 115). There was a strong consensus within UNCITRAL that Contracting States to the Convention would be entitled to expect that a regional economic integration organization that ratifies the Convention, and its own member States, would take the necessary steps to avoid conflicts in the manner in which they applied the Convention (A/60/17, para. 118).

4. Relationship between the Convention and rules enacted by regional economic integration organizations

17. Paragraph 4 regulates the relationship between the Convention and rules enacted by a regional economic integration organization. It provides that the provisions of the Convention shall not prevail over any conflicting rules of any regional economic integration organization as applicable to parties whose respective places of business are located in member States of any such organization, as set out by declaration made in accordance with article 21.

18. The purpose of this exception is to avoid interference with rules enacted by a regional economic integration organization to harmonize private commercial law within the territory of the organization with a view to facilitating the establishment of an internal market among its member States. In giving priority to conflicting rules of an regional economic integration organization, UNCITRAL recognized that measures to promote legal harmonization among member States of a regional economic integration organization may create a situation that is in many respects analogous to the situation in countries where sub-sovereign jurisdictions, such as states or provinces, have legislative authority over private law matters. It was felt that for matters subject to regional legal harmonization, the entire territory covered

by a regional economic integration organization deserved to be treated in a similar way as a single domestic legal system (A/60/17, para. 119).

19. While paragraph 4 sets forth a rule that has not appeared in this form in previous instruments prepared by UNCITRAL, the principle of deference to particular regional regimes embodied in this provision is not entirely new. Article 94 of the United Nations Sales Convention, for example, acknowledges the right of States with similar laws in respect of matters covered by that Convention to declare that their domestic laws take precedence over the provisions of the United Nations Sales Convention in respect of contracts concluded between parties located in their territories.

20. In view of the fact that legal harmonization promoted by a regional economic integration organization may not necessarily cover the entire range of issues dealt with by the Convention, the exception in paragraph 4 does not operate automatically. The priority status of regional rules needs therefore to be set out in a declaration submitted under article 21. The declaration contemplated in paragraph 4 would be submitted by the regional economic integration organization itself, and is distinct from, and without prejudice to, declarations by States under article 19, paragraph 2. If no such organization adheres to the Convention, their member States who wish to do so would still have the right to include, among the other declarations that they may wish to make, a declaration of the type contemplated in paragraph 4 in view of the broad scope of article 19, paragraph 2. It was understood that if a State does not make such a declaration, paragraph 4 would not automatically apply (A/60/17, para. 122).

References to preparatory work:

UNCITRAL, 38th session (Vienna, 4-15 July 2005)	A/60/17, paras. 111-123
WG.IV, 44th session (Vienna, 11-22 October 2004)	A/CN.9/571, para. 10

Article 18. Effect in domestic territorial units

1. If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

3. If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends.

4. If a Contracting State makes no declaration under paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

1. The "federal clause"

21. This article permits a Contracting State, at the time of signature, ratification, acceptance, approval or accession, to declare that the Convention is to extend to all its territorial units or only to one or more of them and to amend its declaration by submitting another declaration at any time. This provision, often called "the federal clause", is of interest to relatively few States—federal systems where the central government lacks treaty power to establish uniform law for the subject matter covered by the Convention. Article 18 addresses this problem by providing that a State may declare that the Convention will apply "only to one or more" of its territorial units—an option that permits a State to adopt the Convention with its applicability limited to those units (e.g. Provinces) that have enacted legislation to implement the Convention.

22. The effect of the provision is therefore on the one hand to permit federal States to apply the Convention progressively to their territorial units and on the other to permit those States that wish to do so to extend its application to all their territorial units from the very outset. Paragraph 2 provides for the declarations to be notified to the depositary and to state expressly the territorial units to which the Convention extends. If no declaration is submitted, the Convention will extend to all territorial units of that State in accordance with paragraph 4.

23. It should be noted however that a State that has two or more territorial units is only entitled to make the declaration under article 18 if different systems of law apply in those units in relation to the matters dealt with in the Convention. Unlike earlier texts in which this clause has appeared, article 18, paragraph 1, does not make reference to the Contracting State's constitution as the basis of the existence of different systems of law in the State concerned. This slight modification, which follows recent practice in other international uniform law instruments (A/60/17, para. 125), should not alter the way the "federal clause" operates.

2. Operation in practice

24. Paragraph 3 makes it clear that, for the purposes of the Convention, a place of business is not considered to be located in a Contracting State when that place of business is located in a territorial unit of a Contracting State to which unit that State has not extended the Convention. The consequences of paragraph 3 will depend on whether or not the Contracting State whose laws apply to an exchange of electronic communications has made a declaration pursuant to article 19, subparagraph 1 (a). If such declaration exists, the Convention would not apply. However, if the applicable law is the law of a Contracting State that has not made this declaration, the Convention would nevertheless apply, as article 1, paragraph 1, does not require that both parties be located in Contracting States (see above, para. ...)

25. The wording in the negative, completed by the proviso "unless [the place of business] is in a territorial unit to which the Convention extends" was chosen so as to avoid creating the misleading impression that the Convention might apply to a contract concluded between parties with places of business in different territorial

units of the same Contracting State to which the Convention had been extended by that State.

26. Article 18 should be read in conjunction with article 6, paragraph 2. Thus, for example, if a large company has places of business in more than one territorial unit of a federal State, not all of which are located in territorial units to which the Convention extends, the decisive factor, in the absence of an indication of a place of business, is the place of business that has the closest relationship to the contract to which the electronic communications relate.

References to preparatory work:

UNCITRAL, 38th session (Vienna, 4-15 July 2005)	A/60/17, paras. 124-125
WG.IV, 44th session (Vienna, 11-22 October 2004)	A/CN.9/571, para. 10

Article 19. Declarations on the scope of application

1. Any Contracting State may declare, in accordance with article 21, that it will apply this Convention only:

(a) When the States referred to in article 1, paragraph 1, are Contracting States to this Convention; or

(b) When the parties have agreed that it applies.

2. Any Contracting State may exclude from the scope of application of this Convention the matters it specifies in a declaration made in accordance with article 21.

1. Nature of declarations

27. The possibility for Contracting States to make declarations aimed at adjusting the scope of application of a particular convention is not uncommon in private international law and commercial law conventions. In this area of treaty practice, they are not regarded as reservations—which the Convention does not permit—and do not have the same consequences as reservations under public international law (see further below, paras. 65-68).

2. Declarations on the geographic scope of application of the Convention

28. As noted earlier (see A/CN.9/608/Add.1, paras. 17-21), pursuant to article 1, paragraph 1, the Convention applies whenever the parties exchanging electronic communications have their places of business in different States, even if those States are not Contracting States to the Convention, as long as the law of a Contracting State is the applicable law.

Article 19, subparagraph 1 (a), allows Contracting States to declare, however, that notwithstanding article 1, paragraph 1, they will apply the Convention only when both States where the parties have their places of business are Contracting States to the Convention.

This type of declaration will have the following practical consequences:

(a) Forum State is a Contracting State that has made a declaration under Article 19, subparagraph 1 (a). The Convention will have "autonomous" application

and will therefore apply to the exchange of electronic communications between parties located in different Contracting States regardless of whether the rules of private international law of the forum State lead to the application of the laws of that State or of another State;

(b) Forum State is a Contracting State that has not made a declaration under Article 19, subparagraph 1 (a). The applicability of the Convention will depend on three factors: (i) whether the rules of private international law point to the law of the forum State, of another Contracting State or of a non-Contracting State; (ii) whether the State the law of which is made applicable under the rules of private international law of the forum State has made a declaration pursuant to article 19, subparagraph 1 (a); and (iii) whether or not both parties have their places of business in different Contracting States. Accordingly, if the applicable law is the law of a Contracting State that has made this declaration, the Convention applies only if both parties have their places of business in different Contracting States. If the applicable law is the law of the forum State or of another Contracting State that has not made this declaration, the Convention applies even if the parties do not have their places of business in different Contracting States. If the applicable law is the law of a non-Contracting State, the Convention does not apply.

(c) Forum State is a non-Contracting State. The Convention will apply, mutatis mutandis, under the same conditions as described in (b) above.

29. The possibility for Contracting States to make this declaration has been introduced so as to facilitate accession to the Convention by States that prefer the enhanced legal certainty offered by an autonomous scope of application, which allows the parties to know beforehand, and independently from rules of private international law when the Convention applies.

3. Limitation based on the choice of the parties

30. Subparagraph 1 (b) contemplates a possible limitation in the scope of application of the Convention. Under this provision, a State may declare that it will apply the Convention only when the parties to a contract have agreed that the Convention applies to the electronic communications exchanged by them. When introducing this possibility, UNCITRAL was aware that a declaration of this type would, in practice, considerably reduce the applicability of the Convention and deprive a State making the declaration of default uniform rules for the use of electronic communications between parties to an international contract that have not agreed on detailed contract rules for the matters covered by the Convention.

31. Another argument against permitting this type of declaration was that it might give rise to some uncertainty on the application of the Convention in non-party States whose rules of private international law directed the courts to the application of the laws of a contracting State that had made such a declaration (A/60/17, para. 128). Some legal systems would accept agreements to subject a contract to the laws of a Contracting State, but would not recognize the right of the parties to incorporate the terms of the Convention as such into their contract on the grounds that an international convention on private law matters would only have legal effect for private parties to the extent that the convention in question has been given effect domestically. Thus, choice-of-law clauses referring to an international convention

would be usually enforced in those countries as incorporation of foreign law, but not as enforcement of the international convention as such (A/CN.9/548, para. 95).

32. The countervailing view was that many legal systems would not create obstacles to the enforcement of a clause choosing an international convention as applicable law. Furthermore, disputes involving international contracts are not solved exclusively by State courts and arbitration is a widespread practice in international trade. Arbitral tribunals are often not specifically linked to any particular geographic location and often rule on the disputes submitted to them on the basis of the law chosen by the parties. In practice, choice-of-law clauses do not always refer to the laws of particular States, as parties often choose to subject their contracts to international conventions independently from the laws of any given jurisdiction (A/CN.9/548, para. 96).

33. UNCITRAL agreed to retain the possibility for States to submit a declaration pursuant to subparagraph 1 (b), as a means of promoting wider adoption of the Convention. It was felt that subparagraph 1 (b) offers those States that might have difficulties in accepting the general application of the Convention under its article 1, paragraph 1, the possibility to allow their nationals to choose the Convention as applicable law (A/60/17, para. 128).

4. Exclusion of specific matters under paragraph 2

34. In preparing the Convention, UNCITRAL aimed at achieving as wide as possible application. General exclusions under article 2, which apply to all Contracting States, have been accordingly kept to a minimum. It was recognized, at the same time, that the degree of acceptance of electronic communications still varies greatly among legal systems and that several jurisdictions still exclude certain matters or types of transactions from the scope of legislation intended to facilitate the use of electronic communications. It was also acknowledged that some legal systems, while accepting electronic communications in connection with certain types of transactions, sometimes subject them to certain specific requirements, for instance as regards the type of electronic signature that the parties may use. Other countries, however, may take a more liberal approach, so that matters excluded or subject to particular requirements in some countries may not be excluded or subject to any special requirement in other countries.

35. In view of that diversity of approaches, UNCITRAL agreed that Contracting States should be given the possibility of excluding certain matters from the scope of application of the Convention by means of declarations submitted under article 21. In adopting this approach, UNCITRAL was mindful of the fact that unilateral exclusions by way of declarations under article 21 are not in theory conducive to enhancing legal certainty. Nevertheless, it was felt that such a system would allow States to limit the application of the Convention as deemed best, while the adoption of a list of exemptions would have the effect to impose those exclusions even for States that see no reason for preventing the parties to the excluded transactions from using electronic communications (A/CN.9/571, para. 63).

36. The types of matters that may be excluded may include matters that some States currently exclude from the scope of domestic legislation enacted to promote electronic commerce (for examples, see A/CN.9/608/Add.1, para. 39). Another type of exclusion might be a declaration limiting the application of the Convention only

to the use of electronic communications in connection with contracts covered by international conventions listed in article 20, paragraph 1, although UNCITRAL was of the view that such a declaration, while possible under the broad terms of article 19, paragraph 2, would not further the desired goal of ensuring the broadest possible application of the Convention and should not be encouraged (A/60/17, para. 129).

References to preparatory work:

UNCITRAL, 38th session (Vienna, 4-15 July 2005)	A/60/17, paras. 126-30
WG.IV, 44th session (Vienna, 11-22 October 2004)	A/CN.9/571, paras. 28-46
WG.IV, 43rd session (New York, 15-19 March 2004)	A/CN.9/548, paras. 27-37

Article 20. Communications exchanged under other international conventions

1. The provisions of this Convention apply to the use of electronic communications in connection with the formation or performance of a contract to which any of the following international conventions, to which a Contracting State to this Convention is or may become a Contracting State, apply:

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958);

Convention on the Limitation Period in the International Sale of Goods (New York, 14 June 1974) and Protocol thereto (Vienna, 11 April 1980);

United Nations Convention on Contracts for the International Sale of Goods (Vienna, 11 April 1980);

United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 19 April 1991);

United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 11 December 1995);

United Nations Convention on the Assignment of Receivables in International Trade (New York, 12 December 2001).

2. The provisions of this Convention apply further to electronic communications in connection with the formation or performance of a contract to which another international convention, treaty or agreement not specifically referred to in paragraph 1 of this article, and to which a Contracting State to this Convention is or may become a Contracting State, applies, unless the State has declared, in accordance with article 21, that it will not be bound by this paragraph.

3. A State that makes a declaration pursuant to paragraph 2 of this article may also declare that it will nevertheless apply the provisions of this Convention to the use of electronic communications in connection with the formation or performance of any contract to

which a specified international convention, treaty or agreement applies to which the State is or may become a Contracting State.

4. Any State may declare that it will not apply the provisions of this Convention to the use of electronic communications in connection with the formation or performance of a contract to which any international convention, treaty or agreement specified in that State's declaration, to which the State is or may become a Contracting State, applies, including any of the conventions referred to in paragraph 1 of this article, even if such State has not excluded the application of paragraph 2 of this article by a declaration made in accordance with article 21.

1. Origin and purpose of the article

37. When it first considered the possibility of further work on electronic commerce after the adoption of the UNCITRAL Model Law on Electronic Signatures, UNCITRAL contemplated, among other issues, a topic broadly referred to as "electronic contracting" and measures that might be needed to remove possible legal obstacles to electronic commerce under existing international conventions. After review of the initial draft of what later became the Convention by UNCITRAL Working Group IV (Electronic Commerce), at its thirty-ninth session (see A/CN.9/509, paras. 18-125) and consideration of the Secretariat's survey of possible legal obstacles to electronic commerce under existing international conventions (see A/CN.9/WG.IV/WP.94) at the fortieth session of the Working Group (see A/CN.9/527, paras. 24-71), it was agreed that UNCITRAL should attempt to identify the common elements between removing legal barriers to electronic commerce in existing instruments and a possible international convention on electronic contracting and that both projects should as much as possible be carried out simultaneously (see A/58/17, para. 213; A/CN.9/527, para. 30 and A/CN.9/546, para. 34). It was eventually agreed that the Convention should incorporate provisions aimed at removing possible legal obstacles to electronic commerce that might arise under existing international trade-related instruments (A/59/17, para. 71).

38. One of the objectives of the work of UNCITRAL towards the removal of possible legal obstacles to electronic commerce in existing international instruments was to formulate solutions that obviate the need for amending individual international conventions. Article 20 intends to offer a possible common solution for some of the legal obstacles to electronic commerce under existing international instruments that had been the object of a study done by the Secretariat (see A/CN.9/WG.IV/WP.94; see also A/CN.9/527, paras. 33-48).

39. The intended effect of the Convention in respect of electronic communications relating to contracts covered by other international conventions is not merely to interpret terms used elsewhere, but to offer substantive rules that allow those other conventions to operate effectively in an electronic environment (A/CN.9/548, para. 51). However, article 20 is not meant to formally amend any international convention, treaty or agreement, whether or not listed in paragraph 1, or to provide an authentic interpretation of any other international convention, treaty or agreement.

2. Relationship between the Convention and other conventions, treaties or agreements

40. The combined effect of paragraphs 1 and 2 of article 20 is that, by ratifying the convention, and except as otherwise declared, a State would automatically undertake to apply the provisions of the convention to electronic communications exchanged in connection with any of the conventions listed in paragraph 1 or any other convention, treaty or agreement to which a Contracting State is or may become a Contracting State. These provisions aim at providing a domestic solution for a problem originating in international instruments. They are based on the recognition that domestic courts already interpret international commercial law instruments. Paragraphs 1 and 2 ensure that a Contracting State would incorporate in its legal system a provision that directs its judicial bodies to use the provisions of the Convention to address legal issues relating to the use of data messages in the context of other international conventions (A/CN.9/548, para. 49).

41. Article 20 does not list which provisions of the Convention can or should be applied to electronic communications exchanged in connection with contracts governed by other conventions, treaties and agreements. Such a list, however valuable in theory, would have been extremely difficult to draw, in view of the diversity of the contractual matters covered by existing conventions. The Convention therefore leaves it for a body applying the Convention to establish which of its provisions might be relevant in respect of the exchange of electronic communications to which other conventions also apply. It is expected that if any provision in the Convention is not appropriate for certain transactions, this circumstance should be clear to a reasonable person applying the Convention (A/CN.9/548, para. 55).

3. The list of Conventions in paragraph 1

42. The list in paragraph 1 has been included merely for purposes of clarity. Parties to contracts falling under the scope of application of the Convention to which any of these conventions also apply will therefore know beforehand that the electronic communications exchanged by them will benefit from the favourable regime provided by the Convention.

43. Five of the conventions listed in paragraph 1 resulted from the work of UNCITRAL: the Convention on the Limitation Period in the International Sale of Goods ("the Limitation Convention");[3] the United Nations Convention on Contracts for the International Sale of Goods ("the United Nations Sales Convention");[4] the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade ("the Terminal Operators Convention");[5] the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit ("the Guarantees Convention");[6] and the United Nations Convention on the Assignment of Receivables in International Trade ("the Receivables Convention").[7] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the

[3] United Nations, *Treaty Series*, vol. 1511, No. 26119, p. 1.
[4] United Nations, *Treaty Series*, vol. 1489, No. 25567, p. 3.
[5] A/CONF.152/13.
[6] A/50/640 and Corr.1, annex.
[7] General Assembly resolution 56/81, annex.

New York Convention")[8] was not prepared by UNCITRAL, but is directly related to its mandate.

44. The fact that two of these conventions have not yet entered into force, namely, the Terminal Operators Convention and the Receivables Convention was not regarded as an obstacle to their inclusion in this list. Indeed, there are several precedents for references in a convention to international instruments that had not yet entered into force at the time the new convention was drafted. One example that resulted from the work of UNCITRAL was the preparation, at the time of the finalization of the United Nations Sales Convention, in 1980, of a protocol to adapt the Limitation Convention, of 1974, at that time not yet in force, to the regime of the United Nations Sales Convention (A/CN.9/548, para. 57).

45. Two of the conventions prepared by UNCITRAL have not been included: the United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 9 December 1988);[9] and the United Nations Convention on the Carriage of Goods by Sea (Hamburg, 31 March 1978).[10] UNCITRAL considered that the possible problems related to the use of electronic communications under those conventions, as well as under other international conventions dealing with negotiable instruments or transport documents, might require specific treatment and that it might not be appropriate to attempt to address those problems in the context of the Convention (A/CN.9/527, para. 29; see also paras. 24-71).

4. General effect in respect of electronic communications related to contracts governed by other international conventions, treaties or agreements

46. The application of the provisions of the Convention to electronic communications exchanged in connection with contracts covered by other international conventions, treaties or agreements was initially limited to electronic communications in the context of a contract covered by one of the conventions listed in paragraph 1. However, it was considered that in many legal systems, the convention could be applied to the use of electronic communications in the context of contracts covered by any other international convention simply by virtue of article 1, without the need for a specific reference to a convention governing such a contract in article 20.

47. Paragraph 2 has therefore been adopted with a view to expand the scope of application of the Convention and allow the parties to a contract to which another legal instrument applies to benefit automatically from the enhanced legal certainty for the exchange of electronic communications that the Convention provides. Given the enabling nature of the provisions of the Convention, it was felt that States would be more likely inclined to extend its provisions to trade-related instruments than to exclude their application to other instruments. Under paragraph 2 such an expansion operates automatically, without the need for Contracting States to submit numerous opt-in declarations to achieve the same result (A/CN.9/571, para. 25).

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[8] United Nations, *Treaty Series*, vol. 330, No. 4739, p. 3.

[9] General Assembly resolution 43/165, annex.

[10] United Nations, *Treaty Series*, vol. 1695, No. 29215, p. 3.

48. Accordingly, in addition to those instruments that, for the avoidance of doubt, are listed in paragraph 1, the provisions of the Convention also apply, pursuant to paragraph 2, to electronic communications exchanged in connection with contracts covered by other international conventions, treaties or agreements, unless such application has been excluded by a Contracting State.

49. Paragraph 2 does not specify the nature of the other conventions, treaties or agreements in support of which the provisions of the Convention may be extended, but the reach of the provision is narrowed down by the reference to electronic communications exchanged "in connection with the formation or performance of a contract". While it was generally understood that those other conventions, treaties or agreements primarily comprise other international agreements or conventions on private commercial law matters, it was felt that such qualification should not be added, as it would unnecessarily restrict the application of paragraph 2. UNCITRAL considered that the Convention could have value for many States in connection with contractual matters other than those relating strictly to private commercial law (A/CN.9/548, para. 60).

50. The last sentence of paragraph 2 allows a Contracting State to exclude the expanded application of the Convention. The possibility has been added to take into account possible concerns of States that may wish to ascertain first whether the provisions contained in the Convention are compatible with their existing international obligations (A/CN.9/548, para. 61).

5. Specific exclusions or inclusions by Contracting States

51. Paragraph 3 adds further flexibility by allowing States to add specific conventions to the list of international instruments to which they would apply the provisions of the Convention—even if the State has submitted a general declaration under paragraph 2.

52. Paragraph 4, in turn, has the opposite effect and allows States to exclude certain specific conventions identified in their declarations. Declarations under paragraph 4 would exclude the application of the Convention to the use of electronic communications in respect of all contracts to which the specified international convention or conventions apply. This provision does not contemplate the possibility for a Contracting State to exclude only certain types or categories of contracts covered by another international convention (A/CN.9/571, para. 56).

53. A declaration under paragraph 3 would extend the application of the entire Convention, as appropriate (see above, para. 42), to electronic communications exchanged in connection with contracts governed by the conventions, treaties or agreements specified in that State's declaration. A Contracting State making such declaration is not allowed to choose which of the provisions of the Convention would be extended, as it was considered that such an approach would create uncertainty as to which provisions of the draft convention applied in any given jurisdiction (A/CN.9/548, para. 64).

References to preparatory work:

UNCITRAL, 38th session (Vienna, 4-15 July 2005)	A/60/17, paras. 131-132
WG.IV, 44th session (Vienna, 11-22 October 2004)	A/CN.9/571, paras. 23-27, 47-58
WG.IV, 43rd session (New York, 15-19 March 2004)	A/CN.9/548, paras. 38-70

Article 21. Procedure and effects of declarations

1. Declarations under article 17, paragraph 4, article 19, paragraphs 1 and 2, and article 20, paragraphs 2, 3 and 4, may be made at any time. Declarations made at the time of signature are subject to confirmation upon ratification, acceptance or approval.

2. Declarations and their confirmations are to be in writing and be formally notified to the depositary.

3. A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary.

4. Any State which makes a declaration under this Convention may modify or withdraw it at any time by a formal notification in writing addressed to the depositary. The modification or withdrawal is to take effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

1. Time and form of declarations

54. Article 21 defines the manner of making a declaration under the Convention and of its withdrawal, as well as the time at which a declaration or its withdrawal becomes effective.

55. Declarations under article 17, paragraph 4, article 19, paragraphs 1 and 2, and article 20, paragraphs 2, 3 and 4, may be made at any time. Other declarations, such as under article 17, paragraph 2, article 18, paragraph 1 (but not a later amendment thereof), must be made at the time of signature, ratification, acceptance or approval. Declarations made at the time of signature are subject to confirmation upon ratification, acceptance or approval. In the absence of confirmation such declarations will be without effect.

56. Several international treaties, including uniform law treaties such as the United Nations Sales Convention,[11] generally authorize Contracting States to submit declarations only at the time of the deposit of their instrument of ratification, acceptance, approval or accession. This limitation is generally justified by the interest in simplifying the operation of the treaty, promoting legal certainty and uniform application of the treaty, which may be hampered by excessive flexibility in making, amending and withdrawing declarations. In the particular case of the

[11] Except for declarations under articles 94, paragraph 1, and article 96 of the United Nations Sales Convention, which can be made at any time.

Convention, however, it was generally felt that in an area as rapidly evolving as the area of electronic commerce, in which technological developments rapidly change existing patterns of business and trade practices, it was essential to afford States a greater degree of flexibility in the application of the Convention. A rigid system of declarations that required decisions to be made by States prior to the deposit of instruments of ratification, acceptance, approval or accession might either deter States from joining the Convention, or might prompt them to act in an overly cautious manner, thereby leading States to exclude automatically the application of the Convention in various areas that would have otherwise benefited from the favourable framework it provides for electronic communications.

57. According to paragraph 2, declarations and confirmations of declarations must be in writing and formally notified to the depositary. This provision also relates to declarations made at the time of accession, to which no reference was made in paragraph 1 since accession presupposes the absence of signature.

2. When declarations take effect

58. Paragraph 3 lays down two rules of general application. The first sentence of paragraph 3, which provides that a declaration takes effect simultaneously with the entry into force of the Convention in respect of the State concerned, contemplates the normal case of a declaration made at the time of signature, ratification, acceptance or accession which will precede the entry into force of the Convention in respect of that State.

59. In accordance with the second sentence of paragraph 3, a declaration that is notified to the depositary after the entry into force of the Convention in respect of the State concerned takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary, a rule which has the advantage of giving other Contracting States some time to become aware of the change in the law of the State making the declaration. UNCITRAL did not accept a proposal to reduce to three months the time when declarations lodged after the entry into force of the convention should take effect, as it was felt that three months could not be adequate time to allow for adjustment in certain business practices (A/60/17, para. 140).

60. Paragraph 4 constitutes a pendant to paragraph 2 and the second sentence of paragraph 3 in that it permits the withdrawal by a State at any time of a declaration by formal notification in writing addressed to the depositary, such withdrawal taking effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

References to preparatory work:

UNCITRAL, 38th session (Vienna, 4-15 July 2005)	A/60/17, paras. 137-141
WG.IV, 44th session (Vienna, 11-22 October 2004)	A/CN.9/571, para. 10

Article 22. Reservations

No reservations may be made under this Convention.

1. Reservations not authorized

61. Article 22 excludes the right of Contracting States to make any reservations to the Convention. The intention of the provision is to prevent States from excluding the application of the Convention by making reservations beyond the declarations specifically provided for in articles 17 to 20.

62. Although it could be argued that an express statement of the rule was not necessary as it might be considered to be implicit in the Convention, its presence certainly excludes any ambiguity which might otherwise exist in the light of Article 19 of the United Nations Convention on the Law of Treaties[12] which permits the formulation of reservations unless: (a) the reservation is prohibited by the treaty; (b) the treaty provides that only specific reservations, which do not include the reservation in question, may be made; or (c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

63. The effect of article 22, therefore, is to bring the Convention squarely within the ambit of Article 19 (a) of the United Nations Convention on the Law of Treaties and thus avoids the possibility of States making reservations of the kind contemplated by Article 19 (c), that is, reservations that are not "incompatible with the object and purpose of the treaty". Any such purported reservation by a Contracting State to the Convention must therefore be deemed ineffective.

2. Distinction between reservations and declarations

64. As indicated above, article 22 clearly excludes any reservation to the Convention. However, it does not affect the right of States to make any of the declarations authorized by the Convention, which do not have the effect of reservations. While this distinction is not always made in general treaty practice, it has become customary for conventions on private international law and commercial law matters to differentiate between declarations and reservations.

65. Unlike most multilateral treaties negotiated by the United Nations, which are typically concerned with the relations between States and other matters of public international law, conventions on private international law and commercial law matters deal with law that applies to private business transactions, and not to State actions, and are typically intended to be incorporated in the domestic legal system. In order to facilitate coordination between existing domestic law and the provisions of an international convention on commercial law or related matters, States are often given the right to make declarations, for example for the purpose of excluding certain matters from the scope of the convention.

66. Recent provisions in UNCITRAL instruments confirm this practice, such as articles 25 and 26 of the United Nations Guarantees Convention and articles 35 to 43 (except for article 38) of the United Nations Receivables Convention, in the same way as final clauses in private international law instruments prepared by other

[12] United Nations, *Treaty Series*, vol. 1155, No. 18232.

international organizations, such as articles 54 to 58 of the UNIDROIT Convention on International Interests in Mobile Equipment (Cape Town, 2001)[13] and articles 21 and 22 of the Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary (The Hague, 2002) concluded by the Hague Conference on Private International Law.[14]

67. This distinction is important because reservations to international treaties typically trigger a formal system of acceptances and objections, for instance as provided in articles 20 and 21 of the United Nations Convention on the Law of Treaties, of 1969. This result would lead to considerable difficulties in the area of private international law, as it might reduce the ability of States to agree on common rules allowing them to adjust the provisions of an international convention to the particular requirements of their domestic legal systems. Therefore, the Convention follows this growing practice and distinguishes between declarations pertaining to the scope of application, which the Convention admits and does not subject to a system of acceptances and objections by other Contracting States, on the one hand, and reservations, on the other hand, which the Convention excludes (see A/60/17, para. 143; see further A/CN.9/571, para. 30).

References to preparatory work:

UNCITRAL, 38th session (Vienna, 4-15 July 2005)	A/60/17, paras. 142-143
WG.IV, 44th session (Vienna, 11-22 October 2004)	A/CN.9/571, para. 10

Article 23. Entry into force

1. This Convention enters into force on the first day of the month following the expiration of six months after the date of deposit of the third instrument of ratification, acceptance, approval or accession.

2. When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the third instrument of ratification, acceptance, approval or accession, this Convention enters into force in respect of that State on the first day of the month following the expiration of six months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

1. Time of entry into force of the Convention

68. The basic provisions governing the entry into force of the Convention are laid down in Article 23 (1). The paragraph provides that the Convention will enter into force on "the first day of the month following the expiration of six months after the deposit of the third instrument of ratification, acceptance, approval or accession."

69. Existing UNCITRAL conventions require as few as three and as many as ten ratifications for entry into force. In choosing a number of three ratifications, UNCITRAL followed the modern trend in commercial law conventions, which promotes their application as early as possible to those States that seek to apply such rules to their commerce (A/60/17, para. 149). A six-month period from the date of deposit of the third instrument of ratification, acceptance, approval or accession

[13] Available at http://www.unidroit.org/english/conventions/mobile-equipment/main.htm.

[14] Available at http://hcch.e-vision.nl/index_en.php?act=conventions.text&cid=72.

is provided so as to give States that become Parties to the Convention sufficient time to notify all the national organisations and individuals concerned that a Convention which would affect them would soon enter into force.

2. Entry into force for States that adhere to the Convention after it has entered into force

70. Paragraph 2 deals with the entry into force of the Convention as regards those States that become Parties thereto after the time for its entry into force under paragraph 1 has already started. In respect of such States the Convention will enter into force on the first day of the month following the expiration of six months after the date of the deposit of their instrument of ratification, acceptance, approval or accession. For example, if a State deposits an instrument of ratification five months before the entry into force of the Convention under paragraph 1, the Convention will enter into force for that State on the first day of the month following the expiration of one month after the Convention has entered into force.

References to preparatory work:

UNCITRAL, 38th session (Vienna, 4-15 July 2005)	A/60/17, paras. 148-150
WG.IV, 44th session (Vienna, 11-22 October 2004)	A/CN.9/571, para. 10

Article 24. Time of application

This Convention and any declaration apply only to electronic communications that are made after the date when the Convention or the declaration enters into force or takes effect in respect of each Contracting State.

71. While article 23 is concerned with the entry into force of the Convention as regards the international obligations of the Contracting States arising under it, article 24 determines the point in time when the Convention commences to apply in respect of the electronic communications governed by it. As expressly indicated in article 24, the Convention only applies prospectively, that is to electronic communications that are made after the date when the Convention entered into force.

72. The words "in respect of each Contracting State" are intended to make it further clear that the article refers to the time when the Convention enters into force in respect of the Contracting State in question, and not when the Convention enters into force generally. This clarification is to avoid the erroneous interpretation that the Convention would have retrospective application in respect of States that adhere to the convention after it had already entered into force pursuant to article 23, paragraph 1 (A/60/17, para. 153). The words "each Contracting State" are further to be understood as referring to the Contracting State whose laws apply to the electronic communication in question.

References to preparatory work:

UNCITRAL, 38th session (Vienna, 4-15 July 2005)	A/60/17, paras. 151-155
WG.IV, 44th session (Vienna, 11-22 October 2004)	A/CN.9/571, para.10

Article 25. Denunciations

1. A Contracting State may denounce this Convention by a formal notification in writing addressed to the depositary.

2. The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

73. Paragraph 1 provides that a State may denounce the Convention by a formal notification in writing addressed to the depositary. Denunciation of the Convention will take effect on the first day of the month following the expiration of twelve months after the notification is received by the depositary, unless such notification specifies a longer period for the denunciation to take effect. The period of twelve months mentioned in paragraph 2, which is twice the period for entry into force of the Convention under article 23, is intended to give sufficient time to all concerned, both in the denouncing State and in other Contracting States, to become aware of the change in the legal regime applicable to electronic communications in that State.

74. Although article 23 requires three Contracting States for the Convention to enter into force, nothing is said as to the fate of the Convention should the number of Contracting Parties subsequently fall below three, for example as a result of denunciations with a view to the acceptance of a new instrument intended to supersede the Convention. It would however seem that the Convention would remain in force since Article 55 of the United Nations Convention on the Law of Treaties provides that "unless the treaty otherwise provides, a multilateral treaty does not terminate by reason only of the fact that the number of parties falls below the number necessary for its entry into force."

References to preparatory work:

UNCITRAL, 38th session (Vienna, 4-15 July 2005)	A/60/17, paras. 156-157
WG.IV, 44th session (Vienna, 11-22 October 2004)	A/CN.9/571, para.10